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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-403

SAMUEL J. JORDON, *et al.*,

Petitioners,

v.

JOHN J. GILLIGAN, *et al.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners Samuel Jordon, et al., submit this supplemental brief with regard to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, No. 73-1977 (May 12, 1975).

The instant case involves a collateral attack on a final District Court order awarding counsel fees. Attorneys' fees were awarded by an order of May 19, 1972, which became final on that date, and from which no appeal was ever taken. Nine months after the entry of this order, Ohio moved to vacate it on the sole ground that the Eleventh Amendment deprived the District Court of jurisdiction to enter such an award against a state. Since this case presents such a collateral attack, rather than a direct appeal, the only ground on which that award of counsel fees may be challenged would be a lack of jurisdiction.

Both courts below properly recognized this limitation. Petition 8a-9a, 18a, 33a-34a. Even if the District Court's decision of May 19, 1972, were erroneous in light of *Alyeska,* such an error would be only an ordinary mistake of law not jurisdictional in nature and not raisable at this late date, three years after the entry of the order from which no appeal was taken.

Were this case a direct appeal from the May 19, 1972, order, the decision below still could not be upheld merely because of *Alyeska.* Counsel fees were awarded on May 19, 1972, not because of the private attorney general or any other rationale, but because the defendants did not oppose them. Petition 1a, 7a. Ten months later, after the defendants sought to collaterally attack the May 19 order, the District Court articulated three independent bases which would have supported an award of counsel fees had the original application for such fees been contested: (1) the "obvious constitutional infirmities" of the statute passed by the legislature and challenged by plaintiffs, a species of obdurate obstinacy, see *Brandenburger* v. *Thompson,* 494 F.2d 885, 890 (9th Cir. 1974), (2) the benefit conferred upon the defendants and the voters of Ohio, citing *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1960), and (3) the private attorney general doctrine. Petition 3a-7a. The sole issue raised on the subsequent appeal, and the sole basis on which the Sixth Circuit reversed the award of counsel fees, was whether the Eleventh Amendment bars awards of counsel fees against a state. That question was expressly left unresolved by this Court's decision in *Alyeska.* Slip opinion, pp. 25, 29, nn. 39, 44.

For the above reasons this Court's decision in *Alyeska Pipeline Service* v. *Wilderness Society,* does not provide an independent basis for affirming the decision of the Court

of Appeals. A Writ of Certiorari should therefore issue to review the judgment and opinion of the Sixth Circuit.

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